FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al., *Petitioners,*

vs.

THE STANFORD DAILY, et al., *Respondents.*

No. 76-1600

LOUIS P. BERGNA, District Attorney, et al., *Petitioners,*

vs.

THE STANFORD DAILY, et al., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS ZURCHER, BONANDER, DEISINGER, MARTIN AND PEARDON

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Subject Index

Table of Authorities Cited

Codes

Constitutions

Rules

Statutes

Texts

Other Authorities

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JAMES ZURCHER, Individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, JIMMIE BONANDER, PAUL DEISINGER, DONALD MARTIN and RICHARD PEARDON, all Individually and as Police Officers of the City of Palo Alto, County of Santa Clara, State of California,
Petitioners,

vs.

THE STANFORD DAILY, FELICITY A. BARRINGER, FRED MANN, EDWARD H. KOHN, RICHARD LEE GREATHOUSE, ROBERT LITTERMAN, HALL DAILY and STEVEN G. UNGAR,
Respondents.

No. 76-1600

LOUIS P. BERGNA, District Attorney, Santa Clara County, California, and CRAIG BROWN, Deputy District Attorney,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
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ARGUMENT

I.

RESPONDENTS RELY UPON UNPROVEN FACTS

Respondents place extraordinary reliance upon facts that (1) are not a matter of record, (2) were controverted below, and therefore must be resolved in Petitioners' favor (6 MOORE'S FEDERAL PRACTICE ¶ 56-27 [1] (2nd ed. 1974)), or (3) are unsupported assumptions.

Respondents assert that no one connected with the *Stanford Daily* was involved in the felonies under investigation or in the hospital demonstration in general. (RB 2, 12.) This is not a matter of record. Petitioners did not know who the suspects were; this was the very reason a warrant for photographs of the assaults was necessary. Petitioners further were denied any reasonable opportunity for discovery before summary judgment was granted[1] to ascertain whether or not student members of the *Stanford Daily* had links to the hospital demonstration. (*See* Petitioners' Brief 6, n.2.)

Respondents rely heavily on the alleged presence of confidential or personal materials in the premises of the *Stanford Daily*. (RB 2-3, 21, n.9, 31-32.) Respondents' allegations were never put to the test via discovery or cross-examination at a trial, however.

Of particular import to Respondents' argument is the unsupported assertion that the magistrate was not

[1]The responding party in a summary judgment context must be given a prior opportunity for discovery in order to establish the existence of a material fact issue. FED. RULES CIV. PROC., rules 56(e), 56(f); KAPLAN, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 HARV. L. REV. 801, 826, 827 (1964).

aware of the impracticality of using a subpoena in this case. (RB 5, 34, 36-37.) The formal record. however, is silent on the point. Reference was made to Judge Phelps' foreknowledge during oral argument on Respondents' summary judgment motion on July 10, 1972. When the district court questioned whether a magistrate could take judicial notice of the policy of a newspaper (RT 135), Mr. Stephenson, attorney for the defendant magistrate, responded:

> "I believe we would be prepared to show that Judge Phelps was in fact informed of that policy. We have not done so in this case. Judge Phelps is not here and indicates he needs his own counsel to be present in this case." (RT 135:11-15.)

When the district court had further questions on the issue, Mr. Stephenson again informed the court:

> "Well, Your Honor, as I indicated, I believe that we would be able to demonstrate, although I have not discussed this with Judge Phelps and myself, that we would be able to indicate that he was apprised of the fact of the [*Stanford Daily*] policy [to destroy incriminating photographs], although Your Honor may not be convinced that that shows adequately on the face of the affidavit." (RT 136:22-25, 137:1-2.)

Subsequently Mr. Stephenson stated again:

> "I am advised that there was an extensive discussion with Judge Phelps prior to the issuance of that warrant. But whether or not—you have earlier indicated you believe that would have to be shown on the face of the affidavit." (RT 157: 1-5.)

II.

THE SEARCH WARRANT WAS PROPER UNDER A FIRST AMENDMENT ANALYSIS

In *Branzburg v. Hayes*, 408 U.S. 665 (1972) the Supreme Court held that requiring journalists to appear and testify before state or federal grand juries does not abridge freedom of speech and press guaranteed by the First Amendment. Further, a journalist does not have any qualified constitutional testimonial privilege.

There is no significant difference between the constitutional claims made in *Branzburg* and those urged by Respondents[2] in this case. (RB 15-16, 18-24.)[3] In *Branzburg* the journalists claimed that the forced rev-

[2]Respondents unsuccessfully urged their First Amendment theories at both the district court and circuit court levels. The district court specifically requested Respondents to concentrate on the broader Fourth Amendment, third-party argument (RT 114-115) and based its decision exclusively on this ground (Petition, App. C). The Ninth Circuit adopted the district court's rationale. (Petition, App. A.)

[3]Respondents allege cost and disruption factors in a search situation. (RB 18.) However, the costs to a newspaper in complying with a subpoena duces tecum can be far greater. There is the expense in having to comb through its files and produce relevant evidence; an even greater cost is entailed when a reporter has to be taken off a beat and cannot file stories because of court appearances. V. Blasi, Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 257 [hereinafter "Blasi"].

Respondents claim that the use of search warrants in a media context is a recent phenomenon. (RB 32, n 17). Yet the situation with respect to search warrants is little different than that concerning media subpoenas. In *Branzburg* the phenomenon of press subpoenas also was argued to be of recent origin and fast growing. (408 U.S. at 699.) Confrontations between law enforcement agencies and the press traditionally had occurred on a local level, where the press usually was able to work things out without going to court, so there was precious little law on the subject. Press Freedoms Under Pressure, Report of the Twentieth Century

elation of confidences would deter sources from giving publishable information to the press, to the detriment of the free flow of information. They used the same "chilling effect" argument Respondents rely upon that it would result in self-censorship by both the

Fund Task Force on the Government and the Press 62 (1972) [hereinafter "Twentieth Century Fund"].

Few subpoenas were issued until 1969, when the Justice Department investigated members of several radical groups, such as the Black Panther Party and the Weatherman faction of Students for a Democratic Society, in connection with such matters as disturbances in Chicago in 1968, a campus bombing in Wisconsin, threatening the President of the United States, and advocating the violent overthrow of the government. *Twentieth Century Fund* at 62-63.

The need to utilize search warrants in connection with criminal investigations, particularly of radical groups and underground newspapers, arose about the same time. Reportedly the Dallas police searched an underground newspaper in 1968 and found quantities of allegedly obscene materials. *Twentieth Century Fund* at 35. A 1969 search of the San Diego *Street Journal's* office is also reported but with little detail. *Id.* at 35, 104.

In 1973 and 1974, after the search herein, warrants reportedly were served on *The Los Angeles Star*, a sexually explicit tabloid, and *The Berkeley Barb*, an underground newspaper in California, in connection with criminal libel charges and documentary evidence in the Patricia Hearst kidnapping case, respectively. Press Censorship Newsletter No. VI at 30-31. In addition, searches of three California radio stations with strong links to radical groups, such as the New World Liberation Front, and with public policies similar to the *Stanford Daily* occurred about the same time. *Id.*

The reputation of underground newspapers and the like for cooperating with criminal investigations was decidedly poor in the late 1960's and early 1970's, particularly in California. Various papers were charged with advocating the violent overthrow of the government, criminal anarchy, and inciting to riot. *Twentieth Century Fund* at 103. Many metropolitan cities felt compelled to deny press credentials and police passes to reporters of underground newspapers. *Id.* at 103-104. A "Third World" San Francisco radio station refused to relinquish a letter from the New World Liberation Front in 1974 announcing the bombing of a San Francisco hotel; a search warrant had to be obtained before it was handed over. Press Censorship Newsletter No. VI at 30. Similar refusals to aid police investigating a Los Angeles hotel bombing and the bombing of a former ITT executive's home by a radical group were given by a Los Angeles radio station and

press and potential sources, thus impairing both the right of the press to publish news and the right of the public to receive information.

The journalists in *Branzburg* urged the Supreme Court to find a qualified testimonial privilege, asserting that the burden on newsgathering outweighed any public interest in obtaining the data unless the government could show that a reporter possesses relevant information unavailable from other sources and for which the government has a compelling need. (408 U.S. at 679-681.) Respondents in this case make the same claim, arguing that the government must make a prior showing to the magistrate not only of the relevance of the items sought but also their unavailability through another process and the compelling need or urgency to resort to a search warrant. (RB 31-40.)

The issue in *Branzburg* (408 U.S. at 682) and the issue in this case are almost identical: The constitutional permissibility of utilizing an investigatory procedure of general applicability to obtain evidence relevant to the investigation and prosecution of crime.[4]

The Los Angeles Free Press, PRESS CENSORSHIP NEWSLETTER No. VII at 11-12. Likewise, *The Berkeley Barb* told the FBI that a radical communique claiming responsibility for a bombing at the General Motors office in San Francisco was "no longer in existence." When a grand jury subpoenaed the document, the reporter to whom it had been delivered pleaded the First and Fifth Amendments. *Id.* at 12.

It was against this background of student unrest, radical groups in our cities and on our campuses, and a spirit of noncooperation being flaunted by parts of the media that the search warrant herein was sought and issued for potentially incriminating photographs on the premises of a college newspaper.

[4]The First Amendment issues are as limited here as in *Branzburg*. (*See* 408 U.S. at 681-682.) There is no intrusion upon speech or assembly, and no prior restraints or restriction on what the press may publish. There is no express or implied command that the press publish what it prefers to withhold, and no exaction or tax for the privilege of publishing. No penalty, civil or criminal, related to the content of published material is sought to be imposed, and the use of confidential sources is neither forbidden nor restricted. There is no requirement that the press publish its sources of information or indiscriminately disclose them upon request.

[5]The Supreme Court pointed out that newsgathering and disseminating organizations were not exempt from the requirements of the National Labor Relations Act, and the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of the press has been rejected. (408 U.S. at 683.) Similarly, assertions that the First Amendment precluded application of the Sherman Act to a newsgathering and

Respondents seek to insulate themselves from the obligations of the rest of our citizens. In *Branzburg* this Court did not permit the press to absolve themselves of such obligations as citizens and did not find in the freedom of the press clause of the First Amendment such protection. In response to the claims made in *Branzburg* that the asserted burden on newsgathering required a privileged position for journalists, this Court responded:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' Associated Press v. NLRB, 301 U.S. 103, 132-133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937). . . ." (408 U.S. at 682-683.)[5]

In upholding the interest of the grand jury in obtaining testimony as against the claimed infringements on freedom of the press, the Supreme Court placed heavy reliance on the fact that society needs

disseminating organization has been overruled, and it has been held that a newspaper may be subjected to nondiscriminatory forms of general taxation. *(Id.)*

> "The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may defer or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. [Citations omitted.] A newspaper or journalist may also be punished for contempt of court, in appropriate circumstances. [Citation omitted.]
>
> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. [Citations omitted.] . . .
>
> "Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. [Citations omitted.] . . ." (408 U.S. at 683-685.)

Since the *Branzburg* case in 1972, this Court has affirmed the general rule. For example, this Court held in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) that the Constitution does not protect the media from severe civil liability in reporting on matters of public or general interest when neither public officials nor public figures are involved. In *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), the Supreme Court rejected the claim of journalists to more First Amendment rights concerning newsworthy events than persons claiming under the freedom of speech clause of the First Amendment.

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), this Court also held that the freedom of a newspaper to control the content of its publications was subordinate to a local law banning sex-designated columns in help-wanted ads. The newspaper had argued that the law abridged its

and has the right to apprehend and punish persons engaged in illegal acts. It emphasized that the grand jury has a dual function in this regard to both determine if there is probable cause to believe a crime has been committed and to protect citizens against unfounded criminal prosecutions. (408 U.S. at 686-687.) A search warrant serves a similar dual function. In modern use, a warrant is an instrument for the investigation of crime and the apprehension of criminals, a basic tool to determine if in fact there is cause to believe a crime has been committed and who has committed it.[8] In addition, a search warrant protects citizens against unfounded criminal prosecutions or unjust guilty verdicts in much the same manner as

editorial judgment regarding acceptance and placement of the advertisement in violation of the First Amendment.

One of the most recent cases directly involving the press and the question of restricting news flow is *Zacchini v. Scripps-Howard Broadcasting Co.*, ... U.S. ....., 97 S.Ct. 2849 (1977). Zacchini, who performed a "human cannonball" act, claimed that a TV station had appropriated his name and act by taping and broadcasting the performance without his permission. The Court agreed that the TV station must pay Zacchini for his commercial stake in the performance, rejecting the First Amendment claim of undue infringement upon the ability of photographers to document the news.

In the freedom of speech area, of particular interest is *Heller v. New York*, 413 U.S. 483 (1973) involving a search warrant for a seizure of an allegedly obscene film. The Supreme Court sustained the seizure, indicating approval by dictum of a requirement of reasonable opportunity for continued showing pending final determination of obscenity but not exempting First Amendment items from seizure *per se*. In the 1976 term, the Supreme Court also upheld special zoning of adult bookstores, thus implicitly approving the zoning of speech-related establishments, in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

[8] *See* THE AMERICAN LAW INSTITUTE, A MODEL CODE OF PREARRAIGNMENT PROCEDURE 491, 509 (1975) [hereinafter "ALI"]; *see also* note 10, *infra*.

the grand jury by uncovering exculpatory as well as incriminating evidence.[7]

The Supreme Court in *Branzburg* also placed emphasis on the constitutional basis and long history of the grand jury. (408 U.S. at 686-688.) Similar historical and constitutional importance is placed on the search warrant. The modern search warrant stems from the old common-law warrant for stealing goods, a quasi-civil procedure for the benefit of victims of larceny or other conversion. THE AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 508 (1975). Constitutional recognition of the search warrant as a legitimate tool in criminal investigation is found in the Fourth Amendment, which specifies the conditions under which it may be issued and authorizes its use.[8]

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[7]This is especially true of photographic evidence possessed by a newspaper. Frequently a news organization will have the best photographic or film record of mass happenings. This evidence can be crucial to a criminal defendant since nuances in the evidence regarding crimes such as obstructing public passages, breaches of peace, resisting arrest, aggravated assault, and refusal to disperse on order may spell the difference between conviction and acquittal (and probably the difference between prosecution or not). *Blasi, supra* note 3, at 253-254.

[8]During the twentieth century judicial opinion has strongly swung to the view that warranted searches ought to be preferred and encouraged. See for example, *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The judicial trend has been to expand the use of search and seizure by warrant, not to restrict its use as Respondents herein urge. Early cases had limited seizable property to fruits and instrumentalities related to the events upon which the intrusion was based. *Carroll v. United States*, 267 U.S. 132, 158 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914). In 1925 the Supreme Court added instrumentalities of escape to the list in *Agnello v. United States*, 269 U.S. 20, 30 (1925). By 1947 the Supreme Court had expanded the scope of warrants further by allowing contraband unrelated to the charge under which an arrest was made to be seized incident to the arrest in *Harris*

The Supreme Court pointed out in *Branzburg* that the federal government and the majority of states had not provided journalists statutorily with the testimonial privilege claimed. (408 U.S. at 689.) Similarly, neither the federal government nor any state has exempted news media from general search and seizure law, either absolutely or on a conditional basis. Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 962 (1976).

In face of the lack of news media shield laws in a majority of the states, the Supreme Court was asked in *Branzburg* to create a testimonial privilege by interpreting the First Amendment to grant journalists a testimonial privilege that other citizens do not enjoy. This Court responded:

> "This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that

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v. United States, 331 U.S. 145, 155 (1947). The view was extended to cover fruits and instrumentalities unrelated to the suspected criminal conduct supporting the search in *Abel v. United States*, 362 U.S. 217, 238 (1960).

The *Harris* doctrine was further expanded to allow seizure of "mere evidence" both related and unrelated to the events in question in *Warden v. Hayden*, 387 U.S. 294, 307 (1967), and *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). The *Warden v. Hayden* decision signaled the expansion of seizable items to both corporeal and incorporeal information either by inspection or surveillance. *ALI, supra* note 6, at 497. The search warrant is such a basic and important tool for effective law enforcement that every jurisdiction in the United States has enacted statutes authorizing the issuance and use of search warrants. *Id.* at 494.

> the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." (408 U.S. at 690-691.)

Similarly in this case, the Court is asked to create a media exception to general search warrant procedures which state and federal governments have declined to do.[9] The search warrant plays as an important and constitutionally recognized role in the fundamental function of government of providing security for the person and property of an individual as a grand jury subpoena.[10] As in *Branzburg*, the record

[9]Respondents contend that the search warrant in question herein now would not be permitted under California's shield law which grants a limited testimonial privilege to newspersons. (RB 28, n. 12.) Respondents base their broad assertion on speculations in a student note in the Stanford Law Review.

The note writer admitted that the argument was theory only; application of California's shield law would require judicial extension of statutory languages not mentioning search situations, directly or indirectly. Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 967, 971 (1976). To date, no California court has chosen to read such an unexpressed intent into the statute.

In general, shield laws would not cover the kind of search warrant executed herein. Many require an explicit understanding of confidentiality between reporter and source (28 STAN. L. REV. 957, 968), an element missing in general photograph situations (*Twentieth Century Fund, supra* note 3, at 20, 50). Clearly absent in this case involving photographing of crimes committed in a public place is either an explicit or implicit understanding of confidentiality.

[10]Even a hostile commentator has acknowledged the importance of the governmental interest in this case: "The primary societal interest underlying law enforcement is 'security for the person

before this Court shows no basis for holding that the public interest in law enforcement and in ensuring an effective method of obtaining critical evidence, fruits, or instrumentalities of crime is insufficient to override the uncertain burden on newsgathering which Respondents allege.[11]

and property of the individual' from 'reprehensible conduct forbidden to all other persons.' In the attempts by police to provide that security, a search is one of the most effective tools. It often provides a swift means of obtaining such persuasive evidence of criminal activity as narcotics, contraband, or weapons. By quarantining illicit items, the search may prevent future crimes as well as help to convict the guilty. Thus far, police executing warrants against news media have sought anonymous communiques claiming credit for crimes or photographs of alleged criminal acts. To the extent the police are denied the use of this technique, the prosecution of a given crime may become considerably more difficult or expensive. Clearly, the utter denial of access to this evidence when held by the press could impose significant costs on society." 28 STAN. L. REV. 957, 973-974.

[11]One commentator opined that the same governmental interest found to be compelling in *Branzburg* was involved in the instant case, reasoning that, "[a]lthough *Branzburg* did stress the grand jury's investigative needs, it is unconvincing to attempt to distinguish it from *Stanford Daily* solely on the grounds that *Stanford Daily* involved searches carried out by law enforcement officials rather than by grand juries. In investigations carried out both by grand juries and by law enforcement officials, the object is in most cases identical: the 'securing of the safety of the person and property of the individual' by the detection and prevention of crime." Note, 86 HARV. L. REV. 1317, 1332 (1973). Similarly, Professor Murasky said that the Delaware court in *In re McGowan*, 298 A.2d 339 (1972) had "accurately observed that the investigatory function of the modern grand jury and of the prosecutor are substantially equivalent, making difficult the articulation of a defensible distinction between them . . . ." D. MURASKY, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 885 (1974) [hereinafter "Murasky"].

As in *Branzburg*, there was no substantial evidence that those searches permitted under the lower courts' rule in this case would hamper newsgathering efforts; the type of affidavits given weight herein as proof of a potential chilling effect were heavily discounted in *Branzburg*. 86 HARV. L. REV. at 1332 and n.89.

These similarities cast doubt on the provision for special treatment for newsgathering interests in search warrant cases. *Id.* at 1332.

As in *Branzburg,* a refusal to grant the qualified privilege requested here will not threaten the vast bulk of confidential relationships between reporters and their sources. (408 U.S. 691.) As in the grand jury situation, a search warrant is directed only to materials relevant to an investigation. Moreover, confidential sources or materials rarely, if ever, will be the object of a search since they normally require personal testimony; hard evidence, such as original communiques and outtakes of public happenings, are the likely objects of a search warrant.[12]

[12]*See, Blasi, supra* note 3, at 61, 210-212, 238-244, 247-248, 250-251, 253; note 10 *supra; ALI, supra* note 6, at 493. There is a compelling public need for such outtakes in a criminal investigation. News organizations will frequently have the only films and tape recordings, and sometimes even the only photographs, of events such as demonstrations. *Blasi, supra* note 3, at 227. The fact that the prosecutor must prove a case beyond a reasonable doubt increases the need to utilize every possible evidentiary source. *Id.* at 238.

Any presumed but unconfirmed reliance by the government on journalists to respond to a subpoena duces tecum, as Respondents urge, can be a grievous error. It is not uncommon for reporters to obtain data by secretly accompanying sources on surreptitious criminal missions or knowingly receiving stolen documents (*Id.* at 242-243), thus making themselves unpublicized accomplices. Furthermore, some publications and television stations now routinely destroy film that might be subpoenaed. *Twentieth Century Fund, supra* note 3, at 21.

The First Amendment interests, in any case, are diminished in the normal outtake context involving on-the-scene coverage of mass demonstrations and riots, since in these circumstances news sources are less likely to have established relationships with the reporters or camera operators and any fall-out effect of perceived cooperation is "quite minimal." *Blasi* at 247-248.

Other commentators agree that there is little reason to protect such outtakes. *See Twentieth Century Fund* at 50; *Murasky, supra* note 11, at 884 ["the chill imposed by compelling a journalist to disclose information not received in confidence but through personal observation probably will not be substantial"]. They suggest, in fact, that a subpoena might be harmful in such cases since the journalist might be perceived as cooperating with the

The Supreme Court in *Branzburg* observed that the argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational nor were the records before the Court silent on the matter. (408 U.S. at 693.) However, the Court was unclear as to how often and to what extent informers are actually deterred from furnishing information. *(Id.)* The "chilling effect" argument has even less to recommend it in a search warrant context. First, since the items sought are not turned over voluntarily, the appearance of aiding the government which is said to be crucial to confidential news sources[13] is not a factor. Second, as in this case, photographic evidence of crimes commit-

criminal investigation, to the possible detriment of future relationships. *Twentieth Century Fund* at 20; *Murasky* at 884-885.

One commentator noted that as of mid-1974 there already had been nearly two dozen journalist privilege cases decided since *Branzburg.* One conclusion from these cases is that, when courts are presented with the question of the witnessing of a crime or the possession of possible criminal evidence, they usually require the evidence to be given. J. GOODALE, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen,* 26 HAST. L. J. 709, 720 (1975) [hereinafter "Goodale"].

[13]The appearance of neutrality by a journalist, rather than any actual breach of a confidence, is more important in dealing with confidential sources. 28 STAN. L. REV. 957, 977, n. 117; *Murasky, supra* note 11, at 890-891; *Blasi, supra* note 3, at 41-43.

The primary concern of reporters is that their mere cooperation with fact-finding tribunals will alienate sources who demand to know of reporters "whose side are you on?" *Blasi* at 44. In fact, when the press appears to oppose the government, it in some respects *improves* the relationships between reporters and radical sources. *Blasi* at 44-45.

Blasi acknowledges that "ordinarily the adverse effect on source relationships is a function of the mere fact of cooperation rather than the contents of the testimony." *Blasi* at 216.

It would appear, therefore, that the *ex parte* nature of most search warrants and the lack of voluntary cooperation by the media would be far less harmful to confidential relationships and newsgathering efforts than a subpoena.

ted during a public event rather than confidential documents normally will be the subject of the warrant. Third, the government may not seize any legally-possessed document which falls outside the scope of the warrant. Finally, even the commentators most hostile to the concept of media subpoenas and media searches agree that there is relatively little reason to protect photographs of a public event, whether published or of the outtake variety. *(See* note 12, *supra.)*

The record in *Branzburg* consisted of a number of affidavits from journalists attached to Respondent Caldwell's initial motion to quash, which detailed experiences by such journalists after they had been subpoenaed. (408 U.S. at 693, n. 31.) The Supreme Court noted that, while these affidavits indicated that some newspersons rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure, the evidence failed to demonstrate that there would be a significant constriction of the flow of news to the public if the Court reaffirmed the testimonial obligations of newsmen. (408 U.S. at 693-695.)

Virtually the same untested affidavits, with the same self-serving claims, are relied upon by Respondents herein. (RB 20-24; *see* note 11, *supra.)* It is similarly unclear in this case as to how often and to what extent informers will be deterred from furnishing information to the press.[14]

[14]The reliance of journalists on confidential materials is uneven both in frequency and manner of use. Over 26% of journalists responding to a survey alleged reliance on regular confidential sources in only 0% to 5% of their stories. *Blasi, supra* note 3, at 21. Nearly half asserted such reliance in 10% or fewer of their stories. *Id.* The quantity and quality of the information given to the press is far less than commonly believed. *Id.* at 40.

For hot, hard news by the local broadcast media, the importance of confidential information lies not so much in gathering news as in simply assessing the accuracy and importance of data received from nonconfidential sources. *Id.* at 26. Many journalists are suspicious of all confidential information, partly because sources are more willing to lie in off-the-record or not-for-attribution statements. *Id.* at 24. And skepticism has been raised as to whether certain confidential relationships have any value at all to the press or public. *Id.* at 249.

The argument for a constitutional privilege in *Branzburg*, as here, rested heavily on those cases holding that the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose. (408 U.S. at 699.) The *Branzburg* Court noted, however, that they were not dealing with a governmental institution that had abused its proper function, and nothing in the record indicated that the grand juries in question were probing at will and without relation to existing need. (408 U.S. at 699-700.) Nor did the grand juries attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether a crime had been committed. (408 U.S. at 700.) In any case, the Court said, the investigative power of the grand jury must be necessarily broad if its public responsibility is to be adequately discharged. *(Id.)* Similar considerations dispose of Respondents' argument in this case.[15]

[15]Undue invasion of First Amendment rights is protected by the triple requirement that the place to be searched and the things to be seized be particularly described, that the warrant be supported

The *Branzburg* Court pointed out that some of the cases relied upon by the press held that the State's interest must be "compelling" to justify even an indirect burden on First Amendment rights, but found that that test also had been met in *Branzburg* since

> "the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of

by traditional probable cause elements, and that the warrant be issued by a neutral magistrate.

A search warrant on the whole is no more disruptive to the press (and may well be less so) than a subpoena when all factors are taken into consideration. *See* note 3, *supra*. A subpoena provides no greater protection for the exercise of First Amendment rights than a search warrant. *Murasky*, *supra* note 11, at 886-887; *accord*, 28 STAN. L. REV. 957, 986-987; 86 HARV. L. REV. 1317, 1324-1327. First, there is a presumption that the government will limit its search to the terms of the warrant; second, in obtaining the warrant the government must demonstrate probable cause to believe a crime has been or is being committed and that the premises or person named therein has evidence of the crime. *Murasky* at 887. These prerequisites the *Bransburg* Court refused to impose on the issuance of grand jury subpoenas, although it was urged to do so. *Id.*

In addition, both processes have judicial input because only a neutral, detached judicial officer may issue a warrant. 28 STAN. L. REV. at 986; *cf.*, *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Preindictment subpoenas issued to third parties, on the other hand, are likely to be very broad, since frequently neither the grand jury nor the prosecutor has identified the particular persons or crimes for which an indictment will be sought; therefore, the courts have imposed few fourth amendment constraints on their breadth or subject matter. 86 HARV. L. REV. at 1324-1325.

The grand jury subpoena upheld in *Branzburg* can be potentially as intrusive as the broadest search warrant. For example, in the early 1970's federal authorities subpoenaed the complete record of all correspondence, memoranda, notes, and telephone calls made by CBS producers in an 18-month period in connection with a news program dealing with the Black Panther Party. *Twentieth Century Fund*, *supra* note 3, at 62.

Similarly broad grand jury subpoenas were issued to *Time*, *Life*, and *Newsweek* magazines for all unedited files and unused pictures dealing with the radical Weathermen and to a *New York Times* reporter for his notes and tape recordings of Black Panther Party members during the preceding year. *Twentieth Century Fund* at 62-63.

> the citizen, and . . . that calling reporters to give testimony in the manner and for the reasons that other citizens are called 'bears a reasonable relationship to the achievment of the governmental purpose asserted as its justification.' Bates v. Little Rock, *supra*, 361 U.S. at 525, 80 S.Ct. at 417. . . ." (408 U.S. at 700-701.)

By the same token, the investigation of crime by the petitioners herein implements a fundamental governmental role. *(See* notes 10, 11, *supra.)* Utilizing a search warrant whenever immediacy and secrecy factors are involved or whenever the need for immediacy and secrecy is unclear bears a reasonable relationship to the achievement of this governmental purpose.

The Court in *Branzburg* noted that similar considerations disposed of the journalists' claims that preliminary to requiring the grand jury appearance, the State must make certain factual showings. (408 U.S. at 701-702.)[16] The role of a grand jury as an impor-

[16]Respondents argue that a case-by-case balancing test must be used (RB 21, 25-26), despite its rejection by the Court's plurality opinion in *Branzburg* (28 STAN. L. REV. 957, 975, 1000-1001; *Murasky*, *supra* note 3, at 875). Since *Branzburg*, this Court has denied review in at least two cases involving the refusal of journalists to testify in criminal investigatory proceedings where the lower courts declined to engage in any balancing of interests on the particular facts. *Lightman v. State*, 294 A.2d 149, *aff'd*, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973); *In re Bridge*, 295 A.2d 3 (1972), *cert. denied*, 410 U.S. 991 (1973).

The prevailing rule, as these cases exemplify, is that in cases involving witnessing of a crime, tapes containing evidence of criminal behavior, or evidence useful to a criminal defendant, the courts have not required any balancing of interests; they have not inquired at any length into the relevance of the information nor whether alternative means to obtain the information exist. *See*,

tant instrument of effective law enforcement necessarily included an investigatory function and to this end it must call witnesses in the manner best needed to perform its task. Society's interest is best served, the Court said, by a thorough and extensive investigation, and the investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way. *(Id.)* Similarly, in this case, the use of a search warrant must not be hampered by the need to investigate and make time consuming factual showings unrelated to the cru-

Murasky at 889; *People v. Dan*, 342 N.Y.S.2d 731 (1973) [reporters witnessed crimes during Attica prison riots]; *State v. Knops*, 183 N.W.2d 93 (1971) [source knew names of the persons responsible for a university bombing which killed a student]; *United States v. Liddy*, 354 F.Supp. 208 (D.D.C. 1972) [interview tapes might impeach a witness against a criminal defendant]; *In re McGowan*, 298 A.2d 339 (1972), *rev'd on procedural grounds*, 303 A.2d 645 (1973) [photographs of a campus demonstration].

In *Farr v. Superior Court*, 22 Cal.App.3d 60, 99 Cal.Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972), a journalist was held in contempt for not revealing the identity of sources who had violated a gag order in the Manson murder trial although the less drastic alternative of ordering a new trial if convictions resulted clearly was an option.

Even if balancing were required under *Branzburg*, the burden would be on Respondents (not Petitioners) to show (a) the irrelevance of the photographs sought, (b) that the evidence or process would further no compelling state interest, or (c) that the evidence is not otherwise required pursuant to a search warrant. *See Goodale, supra* note 12, at 718. On the summary judgment record before this Court, Respondents have failed to affirmatively carry this burden. They rely instead on the understandable omission in the affidavit supporting the search warrant of the apparently superfluous facts concerning the impracticality of using a subpoena in this particular case.

Respondents themselves have failed to show that—in fact—a subpoena was a feasible alternative under the peculiar circumstances of this case. The record is to the contrary. (*See* App. 149-154.)

cial questions of whether seizable items can be found in a particular place at a particular time.[17]

The same practical considerations weighing against such a qualified privilege in *Branzburg* are equally applicable here. *(See* 408 U.S. at 702-706.) It cannot be predicted in advance when and in what circumstances the media would be subject to search and seizure. Therefore, allowing a search to be carried out whenever an adequate showing of impracticality is made *ex parte* to a magistrate is hardly a satisfactory solution to the problems alleged by Respondents.[18] Furthermore, the administration of a journalist's privilege concerning search and seizure would present as many practical and conceptual difficulties as the

[17]Respondents argue that journalists are inherently trustworthy individuals (RB 32-33, 36), an implausible assumption on its face and one disproved by experience. *See* notes 3, 12, *supra*.

Respondents further argue, without any support in the record, that it would be a rare case where a showing of urgency could not be made to the magistrate (RB 35, n. 20) and any delay would be brief (RB 34). Respondents forget that the adverse effect of the qualified privilege they urge occurs not in those easy cases where all conditions already are met but rather in those difficult situations where the need for secrecy or immediate action is not particularly clear.

It would be unusual for professional journalists to publicly state their intent to destroy incriminating photographic evidence, as the *Stanford Daily* did in this case, although it appears that many journalists no longer will cooperate with the government for a variety of reasons and will routinely destroy evidence. *See, Blasi, supra* note 3, at 29-31, 36-37; *Twentieth Century Fund, supra* note 3, at 21, 51, 58-59, 61-62.

[18]*A fortiori* any search has the same potential for abridging freedom of speech that Respondents claim for a student newspaper. Any home, car, and office may contain materials as sensitive or confidential as Respondents allege were present. First and Fourth Amendment claims of privacy and confidentiality equal to, if not more compelling than, that of Respondents can be raised by the attorney whose bank records are taken [*see Burrows v. Superior Court*, 13 Cal.3d 238, 118 Cal.Rptr. 166, 529 P.2d 590

Branzburg Court envisioned. As in *Branzburg*, it would be necessary sooner or later to define those categories of newspersons who qualified for the exemption, "a questionable procedure in light of traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or mimeograph just as much as of the large metropolitan publisher". (408 U.S. at 704.)

The danger that such an exemption might be claimed by groups that set up or use newspapers in order to engage in criminal activity and therefore to be insulated from search and seizure was recognized by the *Bransburg* Court. *(See* 408 U.S. at 705, n. 40.)[19]

(1975)] or the person whose records of telephone calls were handed over by the telephone company [*see People v. McKunes*, 51 Cal.App.3d 487, 124 Cal.Rptr. 126 (1975)].

Exempting newspapers or third parties from the possibility of a search is simply nonresponsive to the problems alleged by Respondents. If a policy change is necessary, it should be a more particularized one emanating from the legislative bodies of federal and state jurisdictions.

[19]The potential problem is demonstrated by organizational peculiarities of some underground news organizations. The underground press defies a precise definition, swinging from political tracts to pornographic trash. It embraces 300 to 350 newspapers plus about 200 sporadic publications, sharing a style that is irreverent, tolerant of drugs, sexually explicit, oriented toward the political left, and anti-establishment. *Twentieth Century Fund, supra* note 3, at 34. The local underground newspaper office not infrequently serves as a gathering center for all adherents to an unconventional political orthodoxy or lifestyle, and large numbers of these persons may, at some time or another, write something for the paper. *Blasi, supra* note 3, at 280. When an edition is being prepared, anyone who wanders into the shop is free to help, sometimes even contributing copy. *Twentieth Century Fund* at 78.

Professor Blasi warned against "erecting a constitutional shield that would immunize an entire political movement or subculture from normal testimonial obligations." *Blasi* at 280. Similar warning flags must be raised against creating media sanctuaries virtually free from *ex parte* search warrants and thus serving the interests of mobsters, terrorists, or run-of-the-mill criminals.

The *Branzburg* Court was not insensitive to the legitimate needs of the press, but invited the federal and state governments to fashion an appropriate remedy:

> "At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. . . ." (408 U.S. at 706.)

The same considerations apply to this case. A variety of responses, from maintaining the status quo to fully exempting news organization from any search and seizure, are available to federal and state governments.[20] It is neither appropriate nor wise for this

[20]The most comprehensive and detailed one is found in The American Law Institute's A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975). The ALI proposed a model search warrant statute which regulates seizure of writings made solely for private use or communication. *Id.* at 124, 504-505.

In addition, the ALI proposed a new procedure for the handling of intermingled documents and a prompt adversary hearing on the return of impounded or removed documents. *Id.* at 129, 134-137. (Warrants for illegally possessed pictures and literature are treated separately. *Id.* at 138-139.)

In initially endeavoring to seek and identify the documents without going through other documents with which they are intermingled, the executing officer, it is suggested, might ask the possessor of the documents to pick out those covered by the warrant. *Id.* at 136.

Court to freeze into constitutional law an inflexible rule that resort must be had to a subpoena in lieu of a search warrant, since less drastic alternatives exist for legislative consideration.

III.

THE SEARCH WARRANT WAS REASONABLE UNDER A FOURTH AMENDMENT ANALYSIS

Respondents briefly touch on the Fourth Amendment aspects of the case as opposed to any First Amendment interests. (RB 40-49.) Respondents erroneously assert that there is no authority for third-party searches and that those courts which dealt with the seizure of evidence from third-parties condemned the practice. (RB 43 and n. 23.) The cases which Respondents rely upon, however, are no authority:

> "[B]ecause these holdings dealt with warrantless searches and because they rested on the now discredited doctrine that 'mere evidence' was immune from seizure, *see* Warden v. Hayden, 387 U.S. 294 (1967), they were of only limited guidance in *Stanford Daily,* which involved a warranted search." 86 HARV. L. REV. 1317, 1319, n. 15.

See, also, the discussion at pages 31 to 32 of Petitioners' brief. The Harvard Law Review commentator further states:

> "In the past, problems relating to the scope of third party searches have usually been presented to courts in the context of an accused's objecting to the introduction of the fruits of a search of a

> third party's property. When an accused has been found to lack standing . . . , courts have failed to reach the merits of the third party search issues. . . .
>
> "The Omnibus Crime Control and Safe Streets Act of 1968, Title III, § 802, 18 U.S.C. § 2515 (1970) does grant statutory standing to federal grand jury witnesses, even though not suspects, to object to questioning based on illegal wiretapping of their conversations. . . ." *Id.* at n. 13.

In addition to the third-party cases cited by Petitioners in their brief at pages 31 to 33 where such searches were found permissible, reference can be made to many other cases which implicitly recognize the validity of a third-party search as a general proposition.[21]

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[21] *See,* notes 3, 18, *supra; see also Wong Sun v. United States,* 371 U.S. 471 (1963) [no basis for suspicion that James Wah Toy was a narcotics dealer upon his warrantless arrest; his statements were unlawfully seized]; *Mancusi v. DeForte,* 392 U.S. 2120 (1968) [union official had personal Fourth Amendment standing to object to alleged unreasonable search and seizure of union records from office shared with other union officials; search of office without a search warrant on the basis of New York district attorney's subpoena duces tecum was held unreasonable]; *Terry v. State of Ohio,* 392 U.S. 1 (1968) [pat down search affirmed where circumstances only warranted further investigation]; *Alderman v. United States,* 394 U.S. 165 (1969) [government informed the court that the illegal electronic surveillance in question was carried on only at premises owned by Petitioner Alderisio's associates or by firms which employed him, that this petitioner did not have desk space at the subject premises, and that the other petitioner had no interest in the places which were the object of the surveillance]; *Wyman v. James,* 400 U.S. 309 (1971) [mother receiving AFDC relief may not refuse warrantless periodic home visits as a condition for the continuance of assistance]; *Gelbard v. United States,* 408 U.S. 41 (1972) [alleged illegal wiretapping and electronic surveillance; petitioners were called before a federal grand jury to be questioned about third parties based upon petitioners' intercepted telephone conversations]; *United States v. Robinson,* 414 U.S. 218 (1973) [where officer had probable cause to arrest de-

IV.

NO DEPRIVATION OF A CIVIL RIGHT RESULTED FROM ANY CONDUCT OF THE POLICE PETITIONERS

Respondents fail to answer Petitioners' point that a Section 1983 action must be analyzed in accordance with tort principles and that any given defendant's conduct must be a proximate cause of the claimed constitutional deprivation. *Monroe v. Pape,* 365 U.S. 167 (1961); *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971); *Hoffman v. Holden,* 268 F.2d 280 (9th Cir. 1959), disapproved on other grounds in *Cohen v. Norris,* 300 F.2d 24 (9th Cir. 1962).

Police Petitioners contend that none of their actions were a proximate cause of any Section 1983 violation. This position is supported by *Madison v. Manter, supra,* which involved the issuance of a search warrant and a claim that the police defendants knew or should have known that there was insufficient probable cause. The *Madison* Court held that the acts of the police officers were not the cause of the deprivation.[22]

fendant for operating a motor vehicle after revocation of his operator's permit, inspection of a crumpled cigarette package found during search of the defendant's person and seizure of heroin capsules were permissible]; *United States v. Infanson,* 235 F.2d 318 (1956) [photographs of defendant seized from woman who became defendant's wife after the seizure and where premises did not belong to defendant were properly admitted as evidence against defendant]; *Clarke v. Neil,* 427 F.2d 1322 (1970) [warrantless search and seizure of suspect's suit at nonsuspect cleaning shop was justified]; *In re Grand Jury Proceedings, Harrisburg, Pennsylvania,* 450 F.2d 199 (1971) [immunized witness could not be examined by grand jury by way of questions based on information obtained through illegal wiretapping].

[22]The Court of Appeals stated that this issue was raised for the first time on appeal; however, the issue was raised in the district court, *see* App. 47, 48, 50, 51 (answer of police defendants), 193, 194, 195, 196 (motion for summary judgment by police officers after initial judgment vacated); in any event, the matter goes to subject-matter jurisdiction and is not waived.

In *Hoffman v. Holden, supra,* the Court of Appeals held that the steps taken preliminary to the issuance of a court order normally are not the cause of any deprivation but rather, that the order itself is the proximate cause. Similarly, the act of executing a court order is not a cause of a deprivation. *Hoffman v. Holden, supra; John v. Gibson,* 270 F.2d 36 (9th Cir. 1959); *Commonwealth of Pennsylvania ex rel. Feiling v. Sincavage,* 439 F.2d 1133 (3rd Cir. 1971); *Thompson v. Baker,* 133 F.Supp. 247 (W.D. Ark. 1955).

The district court in *Thompson v. Baker, supra,* made the following observation in granting the constable's motion to dismiss, at pp. 250-251:

> "It is probable that the allegations of plaintiffs' complaint are sufficient to charge the defendant, W. A. Baker, Justice of the Peace, with a violation of their constitutional rights, in that he allegedly issued writs of garnishment against plaintiffs' employers without the filing of suits by plaintiffs' creditors against them and without any notice whatsoever to the plaintiffs. . . .
>
> "However, there is a serious question as to whether the plaintiffs' allegations in the complaint are sufficient to charge the defendant, R. T. Hoyle, Constable, with a violation of plaintiffs' civil rights. Insofar as the complaint discloses, the only action taken by the defendant, R. T. Hoyle, was in serving writs of garnishment against plaintiffs' employers. . . . [T]he question is not whether the state law has been followed; rather the question is whether the plaintiffs have been denied due process of law, as guaranteed by the Constitution of the United States, by reason of the action of the defendant Hoyle. . . ."

Instead of recognizing that there is a split of judicial authority as to whether judges acting within their judicial function are immune from equitable suits under Section 1983, Respondents assert that no such immunity exists and cite a number of cases for that proposition. However, the cases cited, for the most part, deal with public officials with the power to control a particular situation, rather than individuals who have a mandatory duty to follow and no control.[23]

It is submitted that regardless of whether or not the magistrate herein could have claimed judicial immunity, the derivative judicial immunity should be afforded to these police officers since they obeyed a court order fair on its face and any policy reason for not affording immunity to the magistrate has nothing to do with policemen who do not exceed the scope of the order. *Thompson v. Baker, supra; see also, Campbell v. Glenwood Hills Hospital, Inc.*, 224 F.Supp. 27 (D.C. Minn. 1963).

In summary, the only tests which should be applied to policemen in this context are whether the court order is fair on its face and whether the policemen follow its terms. Any other tests are unnecessary and unfair, for policemen do not and cannot issue search warrants.

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[23]*See, for example, Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974), police officers had control over who was allowed attendance to "Billy Graham Day"; *Safeguard Mutual Ins. Co. v. Miller*, 472 F.2d 732 (3rd Cir. 1973), insurance company suing state insurance agency which had control over violations; *Hadnott v. Amos*, 394 U.S. 358 (1969), state officials had control over election ballots; *Brown v. Board of Education*, 347 U.S. 483 (1954), school boards had control over their schools.

Finally, Respondents' assertion that Chief Zurcher was a proper party to this case is incorrect. Respondents maintain that *Rizzo v. Goode*, 423 U.S. 362 (1976) "could not be more different" (RB 54, n. 29) than the instant case. However, *Rizzo* is dispositive on this issue. Chief Zurcher did not know of the search, did not participate in it and the answer filed in his behalf did not state that he would participate in securing similar search warrants.[24]

Accordingly, no cause of action was stated against any of the policemen, and, alternatively, they should be protected by judicial immunity herein.

V.

"MANIFEST INJUSTICE" SHOULD BE CONSIDERED BY THE COURT HEREIN FOR IT IS APPARENT THAT SUCH WILL RESULT UNDER RESPONDENTS' VIEW OF RETROACTIVITY OF THE ATTORNEY'S FEES AWARD ACT OF 1976

Petitioners pointed out in their opening brief that neither the Act nor its legislative history clearly indicates that fees should be awarded for services rendered long prior to the Act's effective date. Rather, the history shows that it is retroactive only to the extent of pending cases being capable of fee awards and that it should not be applied retroactively herein in that such would result in "manifest injustice" pursuant to this Court's decision in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

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[24]Respondents do not address the issue of the inapplicability of *respondeat superior* liability in Sec. 1983 cases. Again, this issue was presented to the district court, *see* note 22 above.

Respondents reply that consideration of "manifest injustice" is not permitted by the *Bradley* decision since such is only done where the legislative directive is uncertain and that the legislative directive is clear and explicit with regard to retroactive application of this Act. (Respondents' Brief, pp. 55, 56.)

However, Respondents have not answered the narrowly drawn issue presented by Petitioners, for the only legislative history cited by Respondents is the following:

> "'In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).' (H.R. Rep., at 4, n. 6)." (Respondents' Brief, pp. 55, 56.)

Respondents then equate this statement with the proposition that services rendered long prior to the effective date of the Act are to be compensated as well as services rendered after its effective date for pending cases. However, it is clear that the history of the Act does not state that which Respondents claim it does and that, accordingly, the will of Congress is silent on this point, or at best unclear.[25]

[25]Indeed, part of the legislative history seems to recognize limited retroactivity:

> "[I]t would apply to cases now pending, for the simple reason that if that were not the case, the award of fees would depend on the date that the case is filed. I do not think that is the basis on which a determination is made. *To that extent, it is retroactive.* Pending cases could receive an award of reasonable fees." 122 Cong. Rec. H 12155 (daily ed. October 1, 1976) (remarks by Rep. Anderson) (Emphasis added)

Accordingly, consideration of the "manifest injustice" proposition is, in fact, warranted by this Court, pursuant to *Bradley v. Richmond School Board, supra.*

Regardless of whether "manifest injustice" is considered by this Court, it is clear that many federal courts are in fact looking to the equities present in any given case when deciding whether to award fees, based upon the Act, for services rendered prior to its enactment. Respondents sweepingly assert that every other federal court deciding the question has compensated services rendered prior to enactment of the Act.[26] (Respondents' Brief, pp. 58, 59.) However, they have failed to inform this Court that many of the lower courts have in fact recognized that fees are improper where special circumstances exist which would make such an award unjust and have examined or re-examined the record in such cases in order to make such a determination. *See, for example, Wharton v. Knefel,* 562 F.2d 550 (8th Cir. 1977); *Beazer v. New York City Transit Authority,* 558 F.2d 97 (2nd Cir. 1977); *Wade v. Mississippi Co-Op Extension Service,* 424 F.Supp. 1242 (N.D. Miss. 1976).

[26]Many of the cases cited by Respondents involved clear-cut wrongdoing and no special circumstances; for example, see *Alicia Rosado v. Garcia Santiago,* 562 F.2d 114 (1st Cir. 1977), involving a clearly improper firing of a state agency employee; *Seals v. Quarterly County Court,* 562 F.2d 290 (6th Cir. 1977), involving a clear violation of voting rights based upon race; *Hodge v. Seiler,* 558 F.2d 284 (5th Cir. 1977), refusal to rent based upon race; *Rainey v. Jackson State College,* 551 F.2d 672 (5th Cir. 1977), violation of first amendment right of a teacher; *Martinez Rodriguez v. Jiminez,* 551 F.2d 877 (1st Cir. 1977), prison itself constituted clear deprivation—prison closed; *White v. Crowell,* 434 F.Supp. 1119 (W.D. Tenn. 1977), clearly illegal ad hoc reapportionment.

Such examinations by district courts or re-examinations by courts of appeal are in fact mandated by the legislative history of the Act which states:

> "A party seeking to enforce the rights protected by [the Act], if successful, 'should ordinarily recover an attorney's fee *unless special circumstances would render such an award unjust.*' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)." (S. Rep., at p. 4) (Emphasis added)

It is submitted that whatever label or term is used, ultimately an examination of the circumstances of this case is required to determine whether any fee award is just. That examination was not performed by the Court of Appeals herein.

Respondents assert that no "manifest injustice" will occur in this case because while the case was pending in the district court, the "private attorney general" theory then prevailed in the Northern District of California and that the Petitioners' expectations could hardly have been frustrated by the Act.

However, Respondents admit, at n. 32, p. 57 of their brief, that at the time of the search in question, as opposed to the subsequent lawsuit, the award of fees to a successful Civil Rights Act plaintiff was uncertain. They then argue that the fee award herein was predicated upon Petitioners' decision to contest this suit. Such a statement is false and is refuted by the record herein and Respondents' own brief before the Court of Appeals.

No hearing was ever held on an issue of "bad faith" defense of the district court case. The district court based its award on the now-defunct "private attorney general" theory. In fact, Respondents' brief before the Court of Appeals recognized that the decision of this Court in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), undermined the district court's award of fees and requested that the case be remanded to the district court for a hearing on the only ground left open to them, namely, that the defense of this action was allegedly conducted in bad faith, vexatiously, wantonly, or for oppressive reasons. Such a hearing never took place. Furthermore, the statement that the fee award herein stems from contesting the suit is illogical and unwarranted where the case involved a question of first impression in which the constitutional guideline had not yet been articulated by any court and where the search complied with law existing at the time. Following Respondents' rationale, a defendant would be better off to confess judgment in any given situation rather than to file an answer and proceed. Such is not the law, for "reasonable resistance" in the defense of an action is always permitted. *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm.*, 497 F.2d 1113 (2nd Cir. 1974), *cert. den.* 421 U.S. 991 (1975).

Respondents also assert that no "manifest injustice" will result herein in that California Government Code, Section 825 is available to indemnify the individual defendants. However, Respondents fail to point out

that such indemnification is not automatic, that Section 825 by its very terms purports to indemnify against judgments and settlements and no mention is made in the statute of attorney's fees or costs, and what impact the proposed rule would have on those states without such indemnification legislation.[27]

Also, public employees who are subject to an imposition of attorney's fees, either initially or finally, will act with indecision in the future for fear of retribution either for themselves personally or for their employer and such a result is particularly unjust when the conduct complained of complied with existing law. It is grossly unfair and unreasonable that a public employee acting in good faith and obeying a court order is subjected to a personal judgment for violating a citizen's constitutional rights along with a monetary penalty, in the form of attorney's fees, in addition.[28]

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[27]Calif. Gov't. Code Sec. 824, requires a finding that an employee was acting in the course and scope *before* indemnification is permitted. Public employees will still have the dread of a lawsuit and its attendant cost and notoriety, hanging over their heads until and unless the public entity in fact makes a determination of acts within the course and scope of employment.

[28]Police Petitioners also adopt the arguments of their Co-Petitioners that common law immunities are not abrogated by the Act. See, *Universal Amusement Co., Inc. v. Vance*, 559 F.2d 1286 (5th Cir. 1977); *Skehan v. Board of Trustees of Bloomsburg State*, 436 F.Supp. 657 (M.D. Pa. 1977).

CONCLUSION

Petitioners respectfully request that the judgment of the Court of Appeals be reversed and the case dismissed.

Dated, County of Santa Clara, California,
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